

MICHAEL LYNN GABRIEL
LAW OFFICE OF MICHAEL LYNN GABRIEL
1903A COOLEY AVE
EAST PALO ALTO, CA 94303
TELEPHONE: 1-650-888-9189
FAX 1-650 560-0211
EMAIL: aetal@earthlink.net
ATTORNEY FOR PLAINTIFFS

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

STEVEN L. LOMBARDO and

LIFE FORCE TRUST

Plaintiffs,

vs.

DAVID R. SANCHEZ, MERCANTILE

RESOURCE GROUP, INC and CHOCTAW

INDIAN ASSET RECOVERY TRUST dba

CHOCTAW MANAGEMENT GROUP

Defendants

) Case Number: **5:20-cv-02153**

) **OPPOSITION TO MOTION TO**

) **VACATE DEFAULT**

) **JUDGMENT**

Plaintiffs **STEVEN L. LOMBARDO and LIFE FORCE TRUST** hereby submit this
Opposition to the Motion to Vacate Default Judgment by the Defendants **DAVID R.**
SANCHEZ, MERCANTILE RESOURCE GROUP, INC and CHOCTAW INDIAN
ASSET RECOVERY TRUST dba CHOCTAW MANAGEMENT GROUP in the above-
captioned civil action.

TITLE OF DOCUMENT: Opposition to Motion to Vacate Default Judgment
Case No: **5:20-cv-02153**

PAGE NO 1 OF 17

1 1. This Opposition is based on the following points and authorities. the
2 declarations of Steven Lombardo previously filed as ECF 43, Clifford Wilkins, the record and
3 file herein, and such other evidence and argument as may be adduced at a hearing on this
4 matter.

5
6 **POINTS AND AUTHORITIES**

7 **1. STATEMENT OF FACTS**

8
9 2. Plaintiffs' Second Amended complaint alleges that the defendants are liable
10 for Breach of Contract and Breach of Fiduciary Duties.

11 3. The agent of process for the Defendants was personally served with the
12 summons and complaints on July 15, 2020. Mr, Cliff Wilkins in his capacity as agent for
13 the Defendants executed a declaration filed with the proof of summons stating that he had
14 received such service and forwarded the summons and complaints to the all of the
15 Defendants on July 15, 2020. In addition, the Request for Default and Motion for Default
16 Judgment were also served on the agents of service of process for the Defendant on August
17 10, 2020 and Mr. Cliff Wilkins in his capacity as agent for the Defendants executed yet
18 another declaration stating that he had received such service and forwarded the Request for
19 Default and Motion for Default Judgment to the all of the Defendants on July 15, 2020. First
20 Declaration of Cliff Wilkins filed in support of the Motion for Default Judgment ECF 42

21 4. The Defendants failed to appear or otherwise defend in this action within the
22 twenty (21) days the twenty (21) days permitted to answer or file an otherwise responsive
23 pleading.

24 5. The none of the Defendants are a minor or incompetent person.

25 6. On August 11, 2020 the Clerk of this Court was requested to enter all of the
26 Defendants' default and default judgment

27
28 TITLE OF DOCUMENT: Opposition to Motion to Vacate Default Judgment
 Case No: **5:20-cv-02153**

PAGE NO 2 OF 17

1 7. Judge Nathaniel Cousins ordered the appearance at a video hearing of Cliff Wilkins
2 wherein he was examined by the Court to so as to determine if proper service of the complaint
3 had been made

4 8 At the hearing, Cliff Wilkins testified and reaffirmed in his answers to the court
5 that he was the agent for service for all the defendants, that he had received service in that
6 capacity of the summons and complaints and all of the motions thereafter including the motion
7 for default judgment and that he had delivered all of the served documents to the defendants.
8 Mr. Wilkins further stated in his declaration and at the video hearing that he had personally
9 spoken to defendant David Sanchez who confirmed receipt of all of the served documents -
10 especially the amended complaint and the motions for default judgments.

11 9 The hearing by the court in which Mr. Wilkins testified was a Zoom conference
12 so it should be readily available to the court to see first hand and evaluate the testimony of Mr.
13 Cliff Wilkins on the issue of the existence of the agency and sufficiency of the service

14 10. In opposition to the motion filed, Mr Cliff Wilkins has executed an even more
15 detailed declaration than his first one. In his second declaration he goes into great detail stating
16 with examples and confirming emails services he has performed as agent for the defendants. Mr.
17 Wilkins has also enclosed emailed email communications by and between himself and
18 Defendant David Sanchez. Finally in his declaration, Mr. Wilkins attaches in addition to the first
19 one a second Agency Consent agreement executed by the Defendant David Sanchez so as to be
20 sure that Cliff Wilkins was an also agent for service for both for himself and his estate planning
21 trust Choctaw Indian Asset Recovery Trust as well.

22 11. The defendants are asserting two arguments in their Motion to Vacate

23 A. Mr. Wilkins is not an agent and that the first agency consent agreement is a
24 forgery

25 B. That service never took place on Mr. Wilkins

26 12. Both of the declarations of Mr Cliff Wilkins, prove that the agency agreement
27 existed appointing him the agent for all of the Defendants.

28 TITLE OF DOCUMENT: Opposition to Motion to Vacate Default Judgment
Case No: 5:20-cv-02153

PAGE NO 3 OF 17

1 14. The declarations, and especially the second one of Mr. Wilkins go into great
2 detail both explaining and documenting instances which prove that Mr. Wilkins has been acting
3 as the agent for the Defendants for many years.

4 15. Together the Defendants Mercantile and Choctaw each were served with

5 1. The original complaint

6 2. The first Request for Default

7 3. The First Motion for Default Judgment

8 4. The Second Request for Default

9 5. The Second Motion for Default Judgment

10 6. The Response to the Order to Show Cause

11 7. This Third Request for Default

12 8. The Third Motion for Default Judgment

13 16 Each of these services were made on their agent for service of process Cliff
14 Wilkins. That comes to 16 times that he received service for them, For each service he
15 executed a declaration acknowledging receipt and the forwarding the served documents
16 under penalty of perjury to the defendants

17 17 In addition to those 16 services, the Defendant David R, Sanchez was served
18 through his agent Cliff Wilkins another three times.

19 1. The summons and amended complaint'

20 2. The Third request for Default

21 3. The Motion for Summary Judgment

22 18 That means that the Defendant David R. Sanchez has received the services a
23 total of 19 total times and has never bothered to do anything, The Client and Agency
24 Agreement states

25 "All correspondence and/or mail services by and between Ankins and Client(s) will
26 be forwarded or sent to Client(s) to the address stated below ,,,

27 CLIENT DAVID R. SANCHEZ

28 ADDRESS 9676 POPE MANOR WAY, NARETTA, GEORGIA 30063 USA"

TITLE OF DOCUMENT: Opposition to Motion to Vacate Default Judgment
Case No: 5:20-cv-02153

1 19. There can be no finding of excusable neglect when the defendants have been
2 served 19 straight times and yet have never answered and still refuse to do so. This is
3 especially so after being served with the Motion for Default Judgment and not doing
4 anything so that cannot be considered as excusable neglect.

5 20. Judge Cousins found that the testimony of Mr. Wilkins believable and this Court
6 in its review of the Commissioner's report agreed and issued the default judgment.

7 21. The defendants have produced no facts to support their unfounded assertions that after
8 many years of being their agent that suddenly the agency relation never existed and that Mr.
9 Wilkins did not serve them and is committing perjury testifying so.

10 22. Plaintiffs' amended complaint sets forth specific allegations of the Defendant's
11 liability for the restitution of the 82 mortgage bearer bonds along with other written instruments
12 in held by Iron Mountain Intellectual Property Management, Inc hereinafter referred to as Iron
13 Mountain in account number 9183-17646.

14 23. As stated in the amended complaint and documented by the declaration of Steve
15 Lombardo filed with court in support of the Motion for Default Judgment ECF 43 , one half of
16 the bonds were owned by the Plaintiff Steven Lombardo and one half by the Defendant Daniel
17 Sanchez prior to the formation of defendant Mercantile. After the formation of the Defendant
18 Mercantile all of the bonds were transferred in the Defendant Mercantile pursuant to the
19 agreement ECF 1-1 of the amended complaint that if they were not monetized by Jan 2020 they
20 were to be delivered to the Plaintiff Steven Lombardo as he was paying for the monetization of
21 the bonds.

22 24. After January 2020 when the Plaintiff Steve Lombardo requested the bonds, it was
23 discovered that the Defendant David Sanchez had transferred all of the corporate assets to wit all
24

of the bonds to his estate planning trust the defendant Choctaw Indian Asset Recovery Trust including the 50% of the bonds which had been contributed to Mercantile by the Plaintiff.

25 No legal justification has ever been offered by the Defendant David Sanchez explaining the legal basis for taking all of the corporate asset including the Plaintiff's share of the bonds into his own name and hence this lawsuit arose.

2. ARGUMENT

26. Defendants argue that the default judgments should be vacated pursuant to Federal Rule of Civil Procedure Rule 60(b)(1), which allows vacature in cases of "mistake, inadvertence, 4 surprise, or excusable neglect." In evaluating defendants' argument, the Court considers three factors: (1) whether defendants have a meritorious defense; (2) whether the default was the result of defendants' culpable conduct; and (3) whether plaintiffs will be prejudiced. *United States v. \$55,518.05 in U.S. Currency*, 728 F.2d 192, 195 (3d Cir. 1984). This standard is construed liberally, and any "doubts should be resolved in favor of [a] petition to set aside [a default] judgment so that cases may be decided on their merits." *Medunic v. Lederer*, 533 F.2d 891, 894 (3d Cir. 1976). Moreover, "the decision to vacate a default judgment is left to the sound discretion of the trial court." *Harad v. Aetna Cas. & Sur. Co.*, 839 F.2d 979, 982 (3d Cir. 1988).

27. ***Eitel v. McCool***, 782 F.2d 1470 (9th Cir. 1986). the court stated:

"Factors which may be considered by courts in exercising discretion as to the entry of a default judgment include: (1) the possibility of prejudice to the plaintiff, (2) the merits of plaintiff's substantive claim, (3) the sufficiency of the complaint, (4) the sum of money at stake in the action; (5) the possibility of a dispute concerning material facts; (6) whether the default was due to excusable neglect, and (7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits. *Moore's Federal Practice* p 55-05, at 55-24 to 55-26.."

a. MERITORIOUS DEFENSE DOES NOT EXIST

28. With respect to the first factor, a defendant must allege specific facts that, if proven, would establish a meritorious defense to the claim asserted; a perfunctory statement that a meritorious defense exists is insufficient. Harad, 839 F.2d at 982; Pennsylvania Nat. Bank, 87 F.R.D. at 155. In this case, defendants have not met their burden.

29. The amended complaint in the second cause of action alleges breach of fiduciary duties based upon the embezzlement of the bonds when the defendants took the bonds into their own names .

30. Plaintiff is unaware of any power under American corporate law allowing a director to unilaterally take corporate assets in his own name without notice or explanation either before or after the fact. No notice of the transfer or any corporate meeting by shareholders and directors was held authorizing the transfer of all of the corporate assets to any of the Defendants including Defendant David Sanchez personally.

31. Even assuming for this motion alone, that Agreement ECF 1-1 of the amended complaint was not enforceable that alone would not give the Defendant to take all of the bonds for himself, unilaterally and in secret and without explanation. Corporate law simply does not allow that to occur.

32 If the Agreement ECF 1-1 to the Amended Complaint did not exist, then Defendant David Sanchez might have been able to take ½ of the bonds upon a dissolution and termination of the company as his share of corporate assets on the termination. In that case David Sanchez would own 50% of the bonds but he took all - 100% - of the corporate assets so the taking was not under a termination of the company because the company has not been terminated and is still in existence and also because he took twice the assets than he would be entitled in a dissolution.

33. As the taking was not part of a termination and was more corporate assets were taken than the Defendant David Sanchez would have been entitled in a dissolution then the taking of all of the corporate assets was without justification and is a straight forward embezzlement. That point is moot anyway because agreement ECF 1-1 does exists and is enforceable so the Defendant Sanchez

TITLE OF DOCUMENT: Opposition to Motion to Vacate Default Judgment
Case No: 5:20-cv-02153

PAGE NO 7 OF 17

1 had no right to take any of the corporate assets much less all of them into his own personal name
2 and doing so is embezzlement of corporate assets.

3 34. There are no facts presented by the Defendants which would substantiate a
4 meritorious defense to the claim of embezzlement of the corporate assets

5 35. As it is it is now it is simply guess work as to what the facts are that the defendants
6 would rely upon at trial as a defense. With no facts presented there is no basis for the court to
7 conclude that the defendants have a meritorious defense for the embezzlement. There are a stream
8 of affirmative defenses that are standard legal boilerplate attached to every answer but what are the
9 facts that would raise them to meritorious defenses?

10 36. Plaintiff cannot prove the existence of a meritorious defense without the presentation
11 of some facts and none have been presented. How can the court find that a meritorious defense
12 exists if it has no facts upon which to base the finding? Defendants have therefore not demonstrated
13 the existence of a meritorious defense for purposes of Rule 60(b)(1) exists for the embezzlement

14 37. So as there is no meritorious defense for the embezzlement the default judgment must
15 be upheld.

16 38. As for a meritorious defense for the Breach of Contract Cause of Action once again
17 the Defendants have simply made an unsupported contention which is not backed by any facts. The
18 Defendants are simply making a bald face statement that for the breach of contract that the
19 agreement ECF 1-1 is a forgery with no facts substantiating that statement. How would they prove
20 their contention at trial? What facts do they rely to prove the forgery? Have the defendants had a
21 professional handwriting expert analyze the signatures? What are the facts for the meritorious
22 defense which the defendants must produce in order to have a motion to vacate the default judgment
23 be granted.

24 39. As no facts have been presented supporting a meritorious defense for the breach of
25 contract, the motion to vacate for it should be denied as well.

26
27
28 TITLE OF DOCUMENT: Opposition to Motion to Vacate Default Judgment
Case No: 5:20-cv-02153

PAGE NO 8 OF 17

B. DEFENDANTS' MOTION IS UNTIMELY.

40. Defendants file their motion to vacate under Rule 60(b)(4) of the Federal Rules of Civil Procedure. A motion for relief from a judgment pursued under Rule 60(b)(4) must be filed “within a reasonable time.” Fed. R. Civ. Pro. 60(c). *Graham v. Sullivan*, No. 86 Civ. 163, 2002 U.S. LEXIS 18240, at *4 (S.D.N.Y. Sept. 23, 2002); *United States v. Dailide*, 316 F.3d 611, 617-18 (6th Cir. 2003); *Gordon v. Monoson*, 2006 U.S. Dist. LEXIS 34183 *7 (D.V.I. 2006); *but see United States v. One Toshiba Color Television*, 213 F.3d 147 (3d Cir. 2000).

41. Defendant made their first appearance and filed their motion yo vacate the default judgment on January 3, 2020. This was done after having been served with ignoring 19 services and the entry of default judgment in October 2020.

42. Moreover, “[i]n considering Rule 60(b) motions, courts have been unyielding in requiring that a party show good reason for . . . failure to take appropriate action sooner.” *United States v. Martin*, 395 F. Supp. 954, 961 (S.D.N.Y. 1975). Courts must “balance the interest in finality with the reasons for the delay.” *PRC Harris, Inc. v. Boeing Co.*, 700 F.2d 894, 897 (2d Cir. 1983); *Freedom N.Y., Inc. v. United States*, 438 F. Supp. 2D 457 (S.D.N.Y. 2006). Rule 60(b) motions should be denied where a defendant fails to “provide any justification for their own failure to take action after receiving notice that the clerk had entered a default against them.” *New York v. Green*, 420 F.3d 99, 109 (2d Cir. 2006).

43. Defendant David Sanchez is a sophisticated individual as is demonstrated from the record and the pleadings made in this case. Yet, Defendant Sanchez does not provide a good reason for failure to take appropriate action sooner. Instead makes the fabricated, wild and unsupported statement that Cliff Wilkins was not his agent despite the existence of not one but two agency agreements and all of the documentation presented by Cliff Wilkins showing what he has doing as agent for the Defendants.

44. The defendant asks this Court, pursuant to Federal Rules of Civil Procedure Rule 55(c), to “set aside an entry of default for good cause” and to set aside the default judgment for “excusable neglect” under Rule 60(b)(1). For setting aside the default, “[g]ood cause is a mutable standard, varying from situation to situation.” *Compania Interamericana Export-Import, S.A. v.*

1 *Compania Dominicana*, 88 F.3d 948, 951 (11th Cir. 1996). “For all practical purposes, good cause
 2 and excusable neglect are treated alike under the excusable neglect standard of FRCP 60(b).” *Id.*
 3 Consequently, for setting aside the default judgment, the movant must show a lack of prejudice, a
 4 meritorious defense, and a good reason for not responding to the complaint. *In re Worldwide Web*
 5 *Sys., Inc.*, 328 F.3d 1291, 1297 (11th Cir.2003).

6 **C. THE DEFENDANTS CANNOT SHOW GOOD CAUSE OR EXCUSABLE**
 7 **NEGLECT**

8 45. The defendants have failed to articulate a reason why the neglect for not responding
 9 to the dozens of services made upon them should be considered good cause or excusable neglect. The
 10 Supreme Court has held the excusable neglect “determination is at bottom an equitable one, taking
 11 account of all relevant circumstances surrounding the party's omission.” *Pioneer Inv. Services Co. v.*
 12 *Brunswick Associates Ltd. Partn.*, 507 U.S. 380, 395 (1993). Here, the defendants seem to be saying
 13 that their agent did not deliver the legal documents to them.

14 46. Under FRCP 4, service on an agent is good service on the principal. There is no
 15 additional requirement that the plaintiff actually prove that the agent who was appointed by the
 16 principal actually fulfilled his fiduciary duty and delivered the documents.

17 47. To do rewrite FRCP4 to add that requirement makes service on an agent worthless
 18 because principal could simply claim service was not a forwarded and thus not made.

19 48. The circumstances of the service were covered by Mr. Wilkins first declaration and
 20 reaffirmed in the video hearing through the examination conducted by Judge Cousins and has now
 21 even been expanded upon in his second declaration.

22 49. Mr Wilkins’ in his second declaration has clearly set a foundation as solid as cement
 23 that the agency existed and that is shown to exist by past dealings on behalf of the Defendants.

24 50. Plaintiff does not have to prove the subsequent delivery by the defendants’ agent to
 25 them but he has done so anyway. Mr. Wilkins has documented in all of his declarations that he
 26 forwarded the documents to the last known address of the Defendant David Sanchez. Furthermore,

1 Mr. Wilkins' he verified their receipt in a phone call with the Defendant David Sanchez and testified
2 to such under examination by Judge Cousins.

3 51. As such the services were properly made and the defendants have no defense except
4 to accuse their long time agent of many years with forgery, perjury and as the mails were involved
5 with transmission of the served documents conduct which would be RICO violations as well.

6 52. What the defendants have not offered the court is a reason and facts supporting it as
7 to why Mr Wilkins would forge documents, commit perjury and lie under oath before a federal
8 judge, when he is a not a party and without any financial or personal incentive to do so.

9
10 **D. EXISTENCE OF AGENCY BY AGREEMENT**

11 53. There are actually not one but two separate agency agreements with Mr. Wilkins
12 from the Defendant David Sanchez. The first was filed with court as part of ECF 41 for the
13 motion for default and the second is filed herewith as the subexhibit 11 to Mr. Wilkins
14 declaration filed in support of this motion. The second agency agreement Exhibit 1 was given to
15 Mr. Wilkins by the Defendant David Sanchez for himself and his estate planning trust Choctaw
16 Indian Asset Recovery Trust

17 54. So Mr. Wilkins actually has two agency agreements appointing him agent for
18 service of process for the Defendant David Sanchez individually and also appointing him as
19 agent for service for Defendants Mercantile Resource Group and Choctaw Indian Asset
20 Recovery Trust the estate planning trust of the Defendant David Sanchez.

21
22 **E. EXISTENCE OF AGENCY BY ESTOPPEL**

23 55. Plaintiff believe that they have proven that Clifford Wilkins was both the
24 designated agent of service and that service was properly made on the defendants in that
25 capacity. However even if there was not actual authority for Mr. Wilkins to serve as agent, there
26 was an agency by estoppel to do so by the ongoing conduct of the Defendant Davis Sanchez with
27 Mr. Wilkins which created the reasonable belief that such agency for service existed.

28 TITLE OF DOCUMENT: Opposition to Motion to Vacate Default Judgment
Case No: 5:20-cv-02153

1 56. In the case of Pasadena Medi-Center Associates v. Superior Court, 9 Cal.3d 773,
2 108 Cal.Rptr. 828, 511 P.2d 1180 (1973), the California supreme court upheld an agency of
3 estoppel for the service when the conduct of the defendant was such that a reasonable belief that
4 the agency for service existed. The court stated

5 “ The principle of Oro Navigation, which rests upon the perennial proscription that one
6 should not profit from his own wrong, applies forcefully here. Defendant corporation,
7 having misled plaintiff, bears the responsibility for plaintiff’s failure to serve an
8 authorized corporate officer, and should [9 Cal.3d 783] not be permitted to strip itself of
9 assets in order to avoid the payment of an uncontested judgment. **If the rule were**
10 **otherwise we would make of process “a special preserve in which deception pays,**
11 **and technical precision prevails over substantial justice.”** (Tresway Aero, Inc. v.
12 Superior Court (1971) 5 Cal.3d 431, 440 [96 Cal.Rptr. 571, 487 P.2d 1211].) We
13 conclude therefore, that plaintiff, by serving Binney, Sr., a corporate agent with
14 ostensible authority to receive process, effected valid service upon the defendants. The
15 writ of certiorari and peremptory writ of mandate are denied, and the alternative writ of
16 mandate is discharged.’

17 57. The declaration of Cliff Wilkins’ is 28 pages long with detailed description of
18 what he has been doing over the years as agent for the Defendants. Now the Defendants are
19 claiming without any facts or proof that he had no authority to do anything and expect to be
20 believed?

21 58. Mr. Wilkins has sworn under penalty of perjury every single time that that he
22 made a declaration that

- 23 1. The was the agent;
- 24 2 That he accepted the service and
- 25 3. That he delivered the documents to the defendant David Sanchez.

26 59. Mr. Wilkins also testified under oath to the same before the hearing conducted by
27 Judge Cousins. He now repeats that testimony again again through his detailed declaration.

1 60. The defendants' defense is a simply statement of alleged criminal activity alleging
2 perjury, forgery and possibly RICO against Mr. Wilkins. In contrast Mr. Wilkins has
3 documented in his declarations a rather large involvement in the business affairs of the
4 defendant David Sanchez and thus support the agency. Mr. Wilkins shows the intricate
5 relationship of an agent when he states in his Declaration:

6 “1. I formed the Corporation Mercantile Resource Group Inc. on behalf of Mr.
7 Sanchez and Mr. Lombardo, and acted as Agent of “Process of Service.” All entities
8 formed and registered in Nevis require an “Agent of Process of Service” also known
9 as a Registered Agent.”

10 If Mr. Wilkins is not the agent then who is the identified agent? This should be stated as a
11 meritorious defense showing that Mr. Wilkins is not the agent of service recognized by Nevis.

12 61. Mr. Wilkins shows again the intricate relationship of an agent when he states in
13 his Declaration:

14 “9. I was listed as the contact on the deposit receipt for Iron Mountain whereby the bonds
15 were deposited and held for safe keeping since 2002. I was also listed as the contact on
16 the US Government Copyright office.”

17 [See exhibit # 2, Iron MTN deposit receipt and copyright registration.](#)

18 Once again another statement that Mr. Wilkins is an agent made to a third party to wit Iron
19 Mountain the depository of the bonds as the contact person ie agent

20 62. Mr. Wilkins continues to show the intricate relationship of an agent when he
21 states in his Declaration:

22 “10. I decided to leave employment with ATL and go off on my own, but continued to
23 assist David Sanchez and Mr. Lombardo in different capacities. One
24 responsibility as “Agent of Process of Service:” and a second, as a contact person
25 for the Corporation in regards to the Iron Mountain account.

26 [See exhibit #10 sub exh16 – Exh #11 Agent of service agreement, #2 Iron MTN
27 deposit](#)

1 15. Mr. Lombardo asked if I were still the acting, “Agent of Process of Service”, and
2 if I still had the current address for David Sanchez. I said yes, I was still the Agent
3 and verified his current contact information for him personally, for the Trusts,
4 Mercantile, and the Iron Mountain accounts. [See Exhibit #11](#) “

5 Again the second agency agreement from David Sanchez extends the agency to Choctaw Indian
6 Asset Recovery Trust as well as David Sanchez individually

7 63. Mr. Wilkins explains that he reluctantly accepted the service for the defendants in
8 his Declaration:

9 ‘16. Mr. Lombardo later informed me he was going to file a lawsuit against the
10 Corporation and the Trust of David Sanchez, (Choctaw Indian Asset Recovery
11 Trust), for the theft of the Railroad bonds. He requested I serve David and the
12 corporations as required. I was hesitant, but I was required to comply.

13 17. Upon receiving the Complaint and subsequent documents, I served them by mail
14 to the last known address of: 2575 Pope Manor Way, Marietta Ga. 30062
15 [See Exhibit, #11](#)

16 18. I provided a declaration to the court, and was requested by the Federal Court to
17 make an appearance by video conference. I appeared as requested.”

18 64. All of the above creates a most detailed agency relationship with the defendants
19 that would exists even if the agency documents did not exist but they do exist.

20 65. Plaintiffs have established each of the above required conditions necessary for a
21 denial of the motion to vacate by a close reading of Mr. Wilkins’ declaration . As presented in
22 this Opposition and the accompanying affidavit of Clifford Wilkins, the Defendants were
23 properly served with the summons, second amended complaint on July 15, 2020 and the request
24 for default and the motion for default judgment on August 10, 2020 and have failed to appear or
25 otherwise defend this action within the 21 days for the defendants’ answer or other responsive
26 pleading.

27 66. None of the defendant despite being served total of 19 times in this action came
28 forward seeking to stop the entry of default or the granting of the motion for default

TITLE OF DOCUMENT: Opposition to Motion to Vacate Default Judgment
Case No: 5:20-cv-02153

PAGE NO 14 OF 17

1 judgment. The Plaintiffs do not see how the action or inaction of the Defendants can be
 2 considered excusable neglect. There are no facts present upon which the Court could find
 3 that constitute excusable neglect. What we know is that the Defendants were served and have
 4 not answered or appeared,

5 67. If there is a basis for excusable neglect sufficient to set aside a default
 6 judgment then the defendants must present it. They have not come forward to do so. The
 7 argument that the consent agreement is a forgery and that Mr. Wilkins did not serve the
 8 documents is unsupported because it did not happen.

10 CONCLUSION

11 68. For the foregoing reasons, plaintiffs respectfully request that the Court enter
 12 an order denying the Defendants' Motion to Vacate

13 69. The three principal factors to guide the decision on whether to vacate a default
 14 judgment pursuant to the provisions of Rule 60(b): "(1) whether the default was willful, (2)
 15 whether the defendant demonstrates the existence of a meritorious defense, and (3) whether, and
 16 to what extent, vacating the default will cause the nondefaulting party prejudice." *Green*, 420
 17 F.3d at 108. Here, each of these factors unequivocally demonstrates that Defendants' motion to
 18 vacate lacks merit.

19 A. Defendants' Default was Willful.

20 70. Where a defendant is properly served, default is willful where "the conduct of counsel or
 21 litigant was egregious and was not adequately explained." *SEC v. McNulty*, 137 F.3d 732, 738
 22 (2d Cir. 1998). Conduct is not adequately explained where "neither the memorandum nor . . .
 23 affidavit gave any indication that [d]efendant had done anything whatsoever to prevent the
 24 default's occurrence." *Id.* at 740; *see also Todtman, Nachamie, Spizz & Johns, P.C. v. Ashraf*,
 25 No. 05 Civ. 10098, 2007 U.S. Dist. LEXIS 16486, at 10 (S.D.N.Y. 2007) (dismissal proper
 26 where defendant "ignored the summons and complaint for over seven months without
 27 satisfactory explanation"). Not answering after being served 19 times should be enough to prove

1 that the default was willful and that the motion to vacate was untimely.

2
3 **B. The Defendants Cannot Show a Meritorious Defense**

4 71. The Defendants have not sufficiently alleged a meritorious defense to support
5 relief from the judgment. The Defendants raise multiple contentions as affirmative defenses in
6 support of its motion to vacate and set aside the default and default judgment but give no facts in
7 support on any of them. Nothing has been offered as away of fact that the Agency Agreement
8 was forged or that Mr. Wilkins was not the agent or that he was not served on behalf of the
9 defendants. .

10 72. Likewise no evidence or facts have been produce by the defendants that the
11 taking of the bonds was not embezzlement. There simply is no corporate law that would justify
12 what the defendants did in taking the corporate assets in such a secret unilateral action and
13 without notice. Without such facts proving a meritorious defense the default judgment as to that
14 second cause of action for breach of fiduciary duty as a result of the embezzlement must be
upheld.

15 73. As to the meritorious defense of the breach of contract again no facts are
16 produced except gpt a bald face statement that it a forgery with nothing more. The defendants
17 have had the complaint before for close to a year from the first service and in all that time they
18 have done nothing to find facts supporting their bald faced unsupported contention of of a
19 forgery.

20 74. The same allegation of forgery is made against Mr. Wilkins' declaration and testimony
21 also with no supporting facts. What facts do the defendants offer to the Court to prove these
22 unfounded contentions? No facts are alleged in their motion to show his declarations and
23 testimony are false. At the hearing on the motion for default judgment Judge Cousins acted in
24 essence as the attorney for the defendants when he examined Mr. Wilkins on the service and his
25 declaration. Judge Cousins as shown by his taped examination asked the questions which the
26 defendants would be asking and the elicited answers convinced him that perjury had not been
27

1 committed and that proper service on Mr. Wilkins as agent for service for the defendants had
2 been made. That examination is still evidence in the court as it was video taped..

3
4 **C. Vacating the Default Would Prejudice Plaintiffs.**

5 75. Plaintiffs have invested time and effort, at great emotional and personal risk, into
6 the timely litigation of their claims against Defendants. Plaintiffs deserve finality after diligently
7 pursuing their claims.

8 76. Second, enormous effort, including many attorney hours and expense on the part
9 of the Plaintiffs, went into the litigation of this case. Vacating this judgment would mean all this
10 effort would have to be duplicated.

11 77. No facts or justification have been presented by the Defendants as to why they
12 took possession of the bonds ie the corporate assets and are not liable for embezzlement of
13 corporate assets. The defendants' silence thereto can only be assumed to be an admission of
14 liability because in order to prevail on their motion to vacate they must provide such facts and
15 justification to prove a meritorious defense.

16 78. In the absence of a meritorious defense the motion to vacate the default judgment
17 on the second cause of action ie on the embezzlement must be denied just as it should be for the
18 breach of contract for the same reason lack of facts supporting a meritorious defense.

19 79. The bonds are bearer bonds and the defendants fail to protect them they can be
20 lost or destroyed without an effective remedy to recover their value. So the motion to vacate
21 should be denied so the bonds can be delivered pursuant to both the court's judgment and
22 injunction.

23 Dated January 26, 2021

LAW OFFICE OF MICHAEL LYNN GABRIEL

by: /s/ Michael Lynn Gabriel CA Bar No. 86924

MICHAEL LYNN GABRIEL

1903A COOLEY AVE

EAST PALO ALTO, CA 94303

TELEPHONE: 1-650-888-9189

FAX 1-650 560-0211

EMAIL: aetal@earthlink.net

24
25
26
27
28 TITLE OF DOCUMENT: Opposition to Motion to Vacate Default Judgment
Case No: 5:20-cv-02153